2002

David C. Whitney, Con-Blast Inc. v. Larry Faulkner, Roberta Beverly : Reply Brief

Utah Supreme Court

Kira M. Slawson; Blackburn and Stoll; Attorney for Appellees.
Brad C. Smith; Stevenson and Smith; Attorney for Appellants.

BEFORE THE UTAH SUPREME COURT

DAVID C. WHITNEY, an individual, WHITNEY ENTERPRISES, INC., a Minnesota corporation, and CON-BLAST, INC., a Minnesota corporation, Plaintiffs/Appellees/Cross Appellants, vs. LARRY FAULKNER, an individual and ROBERTA BEVERLY, an individual, Defendants/Appellants/Cross Appellees.	Supreme Court Case No. 20020412SC **Oral Argument Requested**

On Appeal from the Judgment and Order of
the Honorable Stanton M. Taylor,
Second Judicial District Court for Weber County, State of Utah.

APPELLANT'S REPLY BRIEF

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BEFORE THE UTAH SUPREME COURT

DAVID C. WHITNEY, an individual, WHITNEY ENTERPRISES, INC., a Minnesota corporation, and CON-BLAST, INC., a Minnesota corporation, Plaintiffs/Appellees/Cross Appellants, vs. LARRY FAULKNER, an individual and ROBERTA BEVERLY, an individual, Defendants/Appellants/Cross Appellees.	Supreme Court Case No. 20020412SC **Oral Argument Requested**

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Table of Authorities

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Additional Statement of Facts

In reply to the fact raised in Appellee's response brief, Faulkner submits the following additional facts:

1. At oral argument before the trial court, Whitney attempted to argue that Faulkner's disclaimer was flawed in that it disclaimed an interest only in an estate, but not Jennie Faulkner's trust. See Hearing Transcript, 14 March 2002, p. 5-6, attached hereto as Exhibit A.

2. Whitney had only raised this argument for the first time in a reply brief, giving Faulkner no opportunity to respond or rebut the argument. Faulkner

objected to this tactic at the hearing. Exhibit A, Hearing Transcript, p. 40 ("it's interesting that that particular argument is not articulated, we have a five inch stack of pleadings, not articulated until the very last pleading that we don't get a chance to respond to. That's a significant fact.").

3. The trial court agreed with Faulkner's objection: "I did agree with Mr. Smith's analysis, Ms. Slawson, on the fact that you did cover something in your rebuttal that wasn't raised in, in the original and, and wasn't considered by him in his materials, and from a procedural point frankly I felt a little uncomfortable with that." Exhibit A, Hearing Transcript, p. 46.

4. The trial court's conclusions of law do not make the conclusion that the Disclaimer itself was in any way void or inadequate but only that the prior receipt of personalty made any disclaimer legally impossible. To the contrary, the findings predicate the trial court's decision on two points: (a) the acceptance of trivial items of personalty absolutely precluded any disclaimer of any other part of the trust estate; and (b) since Faulkner's wife obtained the property he disclaimed, he could not disclaim and confer the benefit on her. See Findings of Fact and Conclusions of Law, Conclusion ¶¶ 5, 7, and 10, attached hereto as Exhibit B.

5. Notwithstanding the trial court's gentle rejection of Whitney's tactic of raising a new argument in a reply brief and notwithstanding the concomitant fact that the issue was therefore never properly raised below, Whitney now gives this argument the honor of primacy in his brief. See Appellee's Brief, pp. 14-16.

6. Taken as a whole, Faulkner's disclaimer plainly disclaimed his interest in his mother's trust estate. It provided:

> Whereas, Lawrence C. Faulkner is a beneficiary of the Trust of Jennie A. Faulkner dated 29 December 1992, and amended on 18 July 1997; and
>
> Whereas, Lawrence C. Faulkner's beneficial interest is a joint interest with his wife, Renee Faulkner; and
>
> Whereas, Lawrence C. Faulkner desires to renounce and relinquish all right, title, interest or claim as a beneficiary of the estate or trust of Jennie A. Faulkner, pursuant to Utah Code Ann. § 75-2-801.
>
> Now therefore, in consideration of the foregoing, and pursuant to Utah Code Ann. § 75-2-801, I, Lawrence C. Faulkner, hereby renounce, relinquish, and otherwise forfeit all my right, title, interest, or claim as a beneficiary of the estate of Jennie A. Faulkner as though I had predeceased her.
>
> DATED this 4 day of April [sic: May], 2001.
>
> /s/ Lawrence C. Faulkner

A copy of re Disclaimer is attached as Exhibit C.

Summary of Argument

Faulkner's disclaimer was valid, timely and effective. The trial court erred in failing to give it effect. Rather than joining issue on this central point, Whitney confuses the issue by discussing an erroneous standard of review. Whitney then presents an argument that the trial court refused to consider because Whitney had failed to brief, except in a reply memo; accordingly, the issue was not preserved for appeal. The bedrock of the trial court's decision, as urged on it by Whitney, was that the acceptance of any property or benefit under the Trust absolutely preclude any disclaimer. This conclusion is simply wrong; without this point, Whitney's entire basis for rejecting the effect of Faulkner's disclaimer evaporates. The error inherent in this conclusion is pointedly illustrated by the supporting argument Whitney advanced that since Faulkner is supported by his wife, he could not disclaim in her favor. This surprisingly gender-biased argument is without support in the disclaimer statute and is inconsistent with long-standing Utah law and policy.

Whitney's attempt to gain prejudgment interest on the garnishment judgment is also infirm. Whitney's argument finds no support in the language of Rule 64D nor in any Utah appellate decision. Instead, Whitney's argument amounts to nothing more than a sophistic argument without any legal, factual or

policy support. To the contrary, Whitney is asking this court to grant him a double recovery: interest on his full judgment –without discount, accruing at every moment during the pendency of the garnishment proceeding– and interest on the garnishment –without discount and accruing at every moment since the garnishment was served. Whitney fails to address where in Rule 64D any support for his position exists. Whitney's argument would turn garnishment practice on its head since, under Whitney's theory, every judgment creditor would be entitled to interest from the garnishment defendant from the moment of service of the writ. Financial institutions would suddenly be incurred large interest obligations from every garnishment. Whitney's request for prejudgment interest is silly. The trial court rightly rejected it and should be affirmed.

Argument

I. This Appeal Presents No Mixed Questions of Law and Fact, but Simply Questions of Law, Subject to De Novo Review.

The judgment and order of the District Court should be reviewed for correctness. The issue before this Court is whether Defendant Larry Faulkner's, ("Faulkner's,") renunciation of interest in his Mother's estate was sufficient to comply with the statutory requirements of Utah law. Matters of statutory construction are reviewed for correctness with no deference given to the trial

court. See, America First Credit Union v. Dep't of Financial Institutions, 2001 UT App 272, ¶6, 33 P.3d 390. (Citations omitted.)

Whitney's arguments regarding the standard of review simply obscures the nature of this appeal. Faulkner *does not challenge any of the trial court's "Findings of Fact."* However, it is a matter of record that the trial court did not conduct a trial or make any true factual findings. To the contrary, this case was decided based upon virtually undisputed facts. While not articulated as such, this case decided on the basis of a summary judgment standard. As such, this court is presented *exclusively* with issues of law for decision.

Whitney attempts to obscure the proper standard of review, arguing that the trial court was presented with a mixed question of law and fact. In so doing, Whitney relies on State v. Pena, 869 P.2d 932 (Utah 1994). Pena outlines the factors to be considered when determining whether a degree of discretion ought to be left to the trial court on a given matter. The Pena court wrote:

> A number of reasons ... are useful in discerning when some degree of discretion ought to be left to a trial court: (I) when the facts to which the legal rule is to be applied are so complex and varying that no rule adequately addressing the relevance of all these facts can be spelled out; (ii) when the situation to which the legal principle is to be applied is sufficiently new to the courts that appellate judges are unable to anticipate and articulate definitively what factors should be outcome determinative; and (iii) when the trial judge has observed "facts," such as a witness's appearance and demeanor, relevant to the application of the law that

> cannot be adequately reflected in the record available to the appellate courts.

Id. at 938-39. (Citations omitted.) The Pena court also noted that interests weighing in favor of giving a trial court discretion must be counterbalanced by the need for uniform interpretation of legal rules. Id. at 939.

The case before this Court has no resemblance to any of the issues identified in Pena. The facts in this matter are not complex, but are straightforward and undisputed.[1] There were no material disputes, nor evidentiary hearings held to establish the facts in this matter before the trial court. For this reason, there were no issues, which the trial court judge was in a better position to observe, and which cannot be adequately reflected in the record before this Court. Finally, issues involving renunciation of interests in estates are nothing new to the appellate courts. The doctrine has existed since the common law, and this case is not one where an appellate court is unable to anticipate what factors should be outcome determinative.

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1. Appellees incorrectly assert that Appellants take issue with the lower court's factual determinations. For purposes of this appeal, as noted above, Appellants have no objection to the purely factual findings made by the lower court. Appellant's brief in chief did refer to the fact that certain of the trial court's "Findings" were made on the basis of conflicting evidence– which is a serious anomaly given the fact that there was no trial and therefore no actual fact-finding which occurred.

Indeed, this case presents a straight forward legal question for resolution. Specifically, the issue is whether an individual can accept some portion of personalty passing through an estate, and subsequently disclaim his interest in the remaining portion of the estate, which passes through a separate provision of the will. Moreover, this is the type of case that "the appellate court decides ... for itself and does not defer in any degree to the trial judge's determination of law." Id. at 936.

II. Whitney Wrongfully Raises Arguments For the First Time On Appeal

The first three pages of Whitney's argument is dedicated to demonstrating that Faulkner's Disclaimer was ineffective to waive any interest in Jennie Faulkner's trust. This argument was not properly raised or briefed by Whitney

before the trial court and should not be considered on appeal.[2] Moreover, it is simply wrong.

Whitney raised his argument that the Disclaimer is ineffective to disclaim any interest due to its wording –an argument even Whitney's counsel conceded was "very technical" for the first time in a reply brief and at oral argument in the trial court Exhibit A, Hearing Transcript, p.5, 40. Faulkner's counsel objected and the trial court sustained the objection. Id. p. 40, 46. Whitney's argument was never briefed by Whitney, subject to counter argument by Faulkner or considered by the trial court. It was not part of the trial court's Findings.

Notwithstanding the impropriety of raising this issue as a new issue in a reply brief and the trial court's gentle rejection of Whitney's scheme, Whitney now unfairly again raises this issue. His failure to raise the issue below, except in a reply brief, precludes consideration of the issue now. See U.P.C., Inc. v. R.O.A.

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2. Perhaps in recognition that this issue was not properly brief and not considered by the trial court, Whitney claims, in his brief to this court, to have "raised" this issue before the trial court. Whitney's Opening Brief, p. 14 n.2. Whitney provides a citation to the record, pages 822 through 825. These four pages are a portion of a reply brief filed by Whitney six days prior to the oral arguments before the trial court on 14 March 2002. In fact, the next item in the court record, page 836, is the court's minute entry following the oral argument. As noted hereinafter, raising an issue for the first time in a reply brief is not appropriate and the trial court rejected this tactic. It is equally fallacious to claim to have raised an issue below by this sort of maneuver.

General, Inc., 1999 UT App. 303, ¶¶ 63-64, 990 P.2d 945 (discussing impropriety of raising an issue for the first time in a reply memorandum). See also, State v. Kruger, 2000 UT 60, ¶ 21, 6 P.3d 1116 (discussing similar rule applying to reply briefs on appeal).

Nevertheless, Whitney's argument is a red herring. It focuses on a single word in the entire document: "estate." Whitney then concludes that this word, in the disclaimer provision, cannot apply to a trust estate. Of course, to reach this point, Whitney must ignore the express recitals and the fact that the trust itself was attached to the Disclaimer. Whitney's argument simply picks a single word, ignores the rest of the document, and then constructs a strawman around his artificial construct. This arcane and –in Whitney's counsel's description– "very technical" argument should be rejected. The document should be read as any other document, as an organic whole, to give effect, where possible, to all its provisions.

This court should refuse to consider Whitney's unbriefed, improperly raised, ill-considered and erroneous argument. It has no place in the analysis of this case.

III. Appellant Larry Faulkner Effectively Renounced his Remaining Interest in his Mother's Estate.

Faulkner's Disclaimer was effective under Utah law. Whitney has cited no authority by which a claimant cannot partially disclaim his interest in an estate. Nor has Whitney cited any authority to suggest that Faulkner cannot accept property passing under one provision of a trust, while disclaiming property under a separate provision of the trust. Moreover, Whitney has attempted to justify their position solely by obscuring the correct standard of review and misconstruing the import of legal authority cited in Appellant's Opening Brief. Case law and sound legal analysis unambiguously supports Faulkner's position.

First, Whitney argues that First Nat'l Bank of Houston v. Toombs, 431 S.W.2d 404 (Tex. Civ. App. 1968) falls contrary to Faulkner's position, asserting that the Texas trial court disallowed the disclaimer. This is not the case. The Toombs court analyzed the nature of the several gifts, some accepted and some disclaimed, and held that a disclaimant may accept some beneficial provisions under a will, while disclaiming other burdensome provisions, if the gifts are separate and independent. The court found the renunciations challenged before it were "timely, valid, enforceable, and legally binding." Id. at 407. Indeed, like the instant matter, the disclaimants in Toombs received separate and

independent devises, and opted to accept the benefit of one, while later rejecting the other.

In re Womble, 289 B.R. 836 (Bankr. N.D. Tex. 2003), is similarly in line with Faulkner's position. In Womble, the disclaimant unilaterally disclaimed all interest he was entitled to under the estate, even after having accepted a benefit previously from the estate. Id. at 850. Contrary to Whitney's suggestion, Texas, has requirements similar to Utah's for describing property to be disclaimed. Tex. Prob. Code Ann. §37A(e) (2003) states, "[A] partial disclaimer shall be effective only with respect to property expressly described or referred to by category..." Cf. Utah Code Ann. § 75-2-801. Womble determined that the disclaimer it faced was sufficient stating, "Womble's alleged acceptance as a beneficiary of the Bentley homestead prior to executing the disclaimer does not invalidate the disclaimer as a whole." Womble at 850.

The other cases Whitney cites from Faulkners' brief illustrate Faulkner's point from the opposite side. For example, in Badouh v. Hale, 22 S.W.2d 392 (Tex. 2000), the disclaimer was rejected because the disclaimant had already exercised dominion and control over the very property the disclaimant sought to disclaim. In this case, at most, Faulkner exercised dominion over trivial items of personalty, passing under a specific provision of the trust, and disclaimed real

estate sales proceeds passing under the residuary clause of the trust That is not the case here, where Larry Faulkner received nothing under the provision of his mother's estate that he sought to renounce. Likewise, in Bank of Delaware v. Smith, 211 A.2d 591 (Del.Ch. 1965), the renunciation was ineffective because the gift was a single, aggregate gift, over which the disclaimant had already exercised partial control. It is undisputed that in this case, Faulkner never had any control or dominion over the home or the sales proceeds from the home. Unlike Badouh and Bank of Delaware, Faulkner did not exercise dominion over the property to be disclaimed, did not accept such property or any benefit under such property, and therefore, never lost the right to disclaim it.

In the instant matter, the Trust had separate provisions governing the distribution of her personal property and the residue of her estate. Whitney does violence to the Trust by conflating these two provisions and arguing that any acceptance of any property under a Trust precludes any disclaimer. Article III.2.C. of the Trust governed the distribution of personal property and household effects. Once personalty was distributed it was no longer part of Jennie Faulkner's trust estate. Article III.2.D, as amended, provides for a separate distribution of the remainder of the trust.

Larry Faulkner properly renounced his interest in that separate provision of the trust, explicitly referencing the Amendment, which dealt only with that provision of the trust, and renouncing all right, title, interest, or claim therein. Indeed, because property had already been distributed under the provisions of the trust, the only remaining portion of the trust estate in which Larry Faulkner had any interest at the time of his disclaimer fell under Article III.2.D, as amended. Larry Faulkner renounced his entire interest therein, and his renunciation was legally effective under Utah Code Ann. § 75-2-801 to disclaim Faulkner's remaining interest in her mother's trust and estate.

Whitney never really joins issue on this point. It is undisputed that Faulkner accepted some items of personalty under Article III.2.C of the Trust. It is undisputed that the gifts of personalty are physically and legally separate and distinct from the real property and real property proceeds. It is also undisputed that Faulkner had no role in the sale of the house or ever accepted any of the proceeds from the sale of the home. Whitney simply aggregates these separate items of property and the separate terms of the Trust without comment, as the unstated assumption of his argument. This argument is without legal or factual support and should be rejected. Case law uniformly stands for the principle that one can accept some property and disclaim other property so long as the gifts are

divisible. These fact being undeniable in this case, there was no impediment to Whitney's disclaimer of all his right, title, interest or claim as a beneficiary." Exhibit C. The trial court erred in concluding otherwise.

IV. The Trial Court Erred in Ruling that Mr. Faulkner Could Not Disclaim in Favor of his Wife.

In its Conclusions of Law, drafted by Whitney's counsel, the district court held:

> The Court finds, alternatively that Mr. Faulkner obtained a benefit from the Trust in that Mr. Faulkner receives all of his support and maintenance from his wife who is the other residuary beneficiary of the Trust. Mr. Faulkner's receipt of a benefit from the Trust bars and invalidates his disclaimer of the Trust property.

Conclusion of Law No. 7, Exhibit C. Interestingly, Whitney's' counsel would now treat this conclusion as a finding of fact as well. While a determination that Mr. Faulkner received a benefit from trust property may be a finding of fact, the Court's conclusion that Mr. Faulkner's renunciation was invalidated because of the purely theoretical and "very technical" notion that Faulkner may derivatively benefit from his wife's good fortune in inheriting from her mother-in-law.[3]

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3. Taken to its logical conclusion, this argument dissolves all bands of separate property between spouses. For example, if my wife inherits the house in which we live, my creditor may argue, under Whitney's theory, that since I

Whitney cites no authority, other than a questionable interpretation of the statute, that would preclude a husband from disclaiming in favor of a wife, or vice versa. This interpretation runs directly counter to the rights of married persons to hold property and income free from the reach of the other spouse's creditors under Utah Code Ann. § 30-2-5(2) (2003). Whitney has provided no response to the applicability of this statute, or to the other arguments made concerning a wife's rights under Utah law. However, application of Utah Code Ann. § 75-2-801(5) (2003) in the manner suggested by Whitney would run in direct violation of these well-established principles. As such, the trial court's legal determination concerning renunciation in favor of a spouse is in error and should be reversed by this Court.

V. Whitney is Not Entitled to Prejudgment Interest.

In his Cross Appeal, Whitney argues that the trial judge erred in failing to award prejudgment interest. Even if Whitney were correct in asserting that funds should have been withheld from Jennie Faulkner's estate, there is no legal basis for exacting prejudgment interest of Renee Faulkner, as a garnishee.

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benefit from having a place to live, my wife's property is now subject to my creditor's claims. In this case, that is the exact effect of Whitney's argument.

Whitney correctly assert that in Utah, the Courts have held that the award or denial of prejudgment interest is a question of law, reviewed for correctness. See, Lyon v. Burton, 2000 UT 55, ¶73, 5 P.3d 616; Cornia v. Wilcox, 898 P.2d 1379, 1387 (Utah 1995). However, this standard of review runs directly counter to those of several other states who hold that determinations of prejudgment interest should only be reversed for abuse of discretion. See, e.g., Dillon v. Montgomery, 67 P.3d 93, 96 (Idaho 2003); Blair Const., Inc. v. McBeth, 44 P.3d 1244, 1251-52 (Kan. 2002); Musto v. Vidas, 754 A.2d 586, 598 (N.J. Super. Ct. App. Div. 2000); Purcell Const., Inc. v. Welch, 17 S.W.3d 398, 402 (Tex. Ct. App. 2000); Pauley v. Gilbert, 522 S.E.2d 208, 213 (W.Va. 1999); Bopp v. Brames, 713 N.E.2d 866, 872 (Ind. Ct. App. 1999); Ditto v. McCurdy, 947 P.2d 961, 979 (Haw. Ct. App. 1997); In re Estate of Wernick, 535 N.E.2d 876, 888 (Ill. 1989). Moreover, given the inherently factual nature of the determination of prejudgment interest under this state's Case law, as will be discussed herein, this Court would do well do change the standard of review accordingly.

However, regardless of the standard of review, Whitney cannot establish entitlement to prejudgment interest. First, the authorities cited by Whitney do not apply to the instant matter. Whitney relies on Utah Code Ann. §15-1-1 (2003). The plain language of this statute limits its application to actions involving

contract. Furthermore, while §15-1-1 establishes a default rate of interest at ten percent, it does not create an independent right to interest where none otherwise exists. See, Vali Convalescent and Care Institutions v. Div. of Health Care Financing, 797 P.2d 438, 445 (Utah Ct. App. 1990).

Second, Whitney's' reliance on archaic Case law is utterly misplaced. Under Wasatch Mining Co. v. Crescent Mining Co., 24 P. 586 (1890), the Court found that interest may be allowed in the absence of statute or contract. However, this decision, which pre-dates statehood does not create a right to prejudgment interest, nor does it comport with stricter requirements placed on awards of prejudgment interest since that time. Moreover, Wasatch Mining in no way analyzes or comports with the provisions of Rule 64D. An analysis of the rules governing garnishments, and the case law rules governing awards of prejudgment interest demonstrates that the trial court correctly denied Whitney the relief sought. In fact, while Whitney cites to numerous cases in the portion of his brief claiming a right to interest, Whitney is unable to cite to a single case in which any Utah court has ever awarded interest on a garnishment. This is true for a simple reason: *there are none.*

Whitney's misplaced interest claim stems from his utter misapprehension of the effect of a garnishment. Whitney states, in his brief, that "Ms. Faulkner owed

Mr. Faulkner, and thus Mr. Whitney." Whitney Brief, p. 31. Utah law is clear that a garnishment plaintiff stands in the same shoes as the garnishment defendant with respect to the judgment debtor, becoming, in effect, subrogated to the garnishment defendant. Lang v. Lang, 403 P.2d 655, 657 & n.3 (Utah 1965), quoting Nat'l Bank of Tucson v. Reininger Mining & Smelting Co., 295 P. 79, 80 (Cal. Ct. App. 1931). However, Whitney does not acquire *more* rights than Faulkner would have had against Renee. Renee promptly disbursed the trust upon receipt of the sales proceeds. Faulkner would have had no claim for prejudgment interest against Renee; accordingly, neither does Whitney.

The express terms of Rule 64D strongly indicate that no prejudgment interest may be granted against a garnishee defendant. For example, under the provisions to ascertain whether property is exempt from garnishment or not subject to garnishment, if the court concludes that the property may be garnished "it shall issue an order to pay the Property Subject to Garnishment directly to plaintiff or plaintiff's attorney or as otherwise ordered by the court." Utah R. Civ. P. 64D(h)(iii). Similarly, if matters other than exemptions or ownership of garnished property are raised, following the resolution of the dispute, "judgment shall be entered upon the verdict or finding the same as if the garnishee had answered according to such verdict or finding." Utah R. Civ. P. 64D(l). In either

case, only the Property Subject to Garnishment is to be paid over. There is no mention of any interest because no interest is intended under the rule.

In the context of a post-judgment collection garnishment, like the present case, this makes great sense. Since a judgment is already in place, the judgment creditor is fully protected in that the judgment is incurring interest at the lawful post-judgment rate. When a garnishment is issued to a third party, interest continues on the whole judgment until the garnishment proceeds are paid over; the judgment creditor thus recovers a full measure of compensation.

Whitney's argument unfairly and impermissibly creates, in effect, two judgments: the original judgment, upon which the writ of garnishment issued and a new, second judgment, arising from the writ itself. So, in this case, Whitney's argument goes, he is entitled to post-judgment interest on his $500,000+ judgment *and* additionally, post-judgment interest on the $29.000.00 garnishment, for exactly the same time period. Thus, during the two years this matter has been pending, Whitney claims entitlement to interest on both the $500,000 judgment and the $29,000 garnishment. This claim is, as noted above, utterly without support in the law.

Furthermore, an allowance of prejudgment interest against a garnishee runs contrary to the reasoning underlying judicial rules allowing its award. Under

Utah Case law, prejudgment interest has specific, defined purposes. "As a matter of public policy, award of prejudgment interest simply serves to compensate a party for the depreciating value of the amount owed over time and, as a corollary, deters parties from intentionally withholding an amount that is liquidated and owing." Trail Mountain Coal Co. v. Utah Div. of State Lands and Forestry, 921 P.2d 1365, 1370 (Utah 1996). See, also, Campbell, Maack & Sessions v. DeBry, 2001 UT App 397, ¶23, 38 P.3d 984; Lefavi v. Bertoch, 2000 UT App 5, ¶24, 994 P.2d 817; Baker v. Dataphase, 781 F.Supp. 724, 731 (D.Utah 1992).

Whitney's argument would play havoc with the trial courts. Suddenly, every time a writ of garnishment issued, a new judgment would be created. When a bank or credit union received a writ of garnishment on an account, suddenly, the bank or credit union itself would be liable for interest on the garnished amount, even through the rule itself allows the bank to wait for a garnishee release order. Whitney's argument makes no allowance for these practical considerations.

Of course, these practical considerations have grown up around Rule 64D itself. Garnishee defendants are required to answer the writ and interrogatories. If there is a dispute, upon resolution, the Garnishee Defendant is liable, at most,

for the Property Subject to Garnishment. The judgment creditor is fully protected by the fact that the judgment continues to accrue interest. However, the mere fact that there is a dispute to resolve does not create a new right to additional interest. Such, however, is exactly Whitney's argument.

There is simply no basis for an award of interest. Rule 64D does not so provide and indeed, strongly indicates no such entitlement. The mere fact that Whitney's primary legal support is a case predating statehood and the adoption of the Utah Rules of Civil Procedure is also a strong indication that Whitney's argument is misplaced. Practical considerations and basic fairness should doom Whitney's efforts to obtain a double recovery. The cross-appeal should be rejected and the trial court's refusal to grant post-judgment interest on both the underlying judgment and the garnished funds should be affirmed.

Conclusion

Mr. Faulkner executed a valid renunciation of interest, which specifically disclaimed his interest in the remainder of his mother's Trust Estate, which passed under a separate residuary clause. Mr. Faulkner's prior acceptance of personal property did not affect or limit his ability to disclaim under Utah Code Ann. §75-2-801. Nor was Mr. Faulkner prevented from disclaiming his interest

where the benefit would pass to his wife. Mr. Faulkner's renunciation should be given full legal effect and the trial court's decision reversed in that regards. As to prejudgment interest, there is no basis under Utah law for an award of prejudgment interest against Renee Faulkner as garnishee. There is no provision for such an award under the Rules of Civil Procedure, and this case does not satisfy the Case law requirements for prejudgment interest in this state.

Oral Argument Requested.

DATED this 1 day of Aug, 2003.

for Brad C. Smith
Attorney for Appellants

Certificate of Service

I hereby certify that I mailed two true and correct copies of the foregoing Appellant's Reply Brief, postage prepaid, this 1 day of Aug, 2003, to the following:

Kira M. Slawson
BLACKBURN & STOLL, L.C.
77 West 200 South, Suite 400
Salt Lake City, UT 84101

Exhibit A
Excerpts from Hearing Transcript,
13 March 2002

IN THE SECOND JUDICIAL DISTRICT - OGDEN COURT

WEBER COUNTY, STATE OF UTAH

DAVID C. WHITNEY, et al.,	**MOTIONS**
Plaintiff,	
vs.	
LARRY FAULKNER, et al,	**Case 960900213**
	Appeal 20020412-SC
Defendant.	**Judge Stanton M. Taylor**

BE IT REMEMBERED that this matter came on for hearing before the above-named court on **March 14, 2002.**

WHEREUPON, the parties appearing and represented by counsel, the following proceedings were held:

CERTIFIED TRANSCRIPT

(From Electronic Recording)

PENNY C. ABBOTT, REPORTER-TRANSCRIBER
LIC. 122-102811-7801
PHONE: (801) 423-1009 FAX: (801) 423-2663

deals, that came from a trust. If the property is devolved to the person by revocable trust the statute requires that the written disclaimer generally must be made within nine months that the revocable trust became irrevocable. In this case that would have been the date of death. The disclaimer must be delivered to the person who has legal title to the property. In this case that would be the trustee, Ranae Faulkner. And it must be delivered in person or by certified or registered mail in order for it to be a valid disclaimer.

Because the Utah disclaimer statute has different procedures for property that devolves by will or intestacy and property that devolves by trust or contract, the intended disclaimant must properly designate the specific property being disclaimed and strictly comply with the statutory requirements particular to that kind of property.

It is undisputed in this case that Mr. Faulkner is the beneficiary of his mother's estate. It is also undisputed that he is a named beneficiary of her trust, and that's the Jenny A. Faulkner trust that I'm referring to.

On May 4th of 2001 Larry Faulkner's attorney prepared an instrument entitled Renunciation of Interest, and this was prepared purportedly in compliance with Utah Code Annotated 75-2-801. Although the recitals of the renunciation of interest state that Mr. Faulkner quote:

"desires to renounce and relinquish all right, title and interest or claim as a beneficiary of the estate or trust of Jenny A. Faulkner pursuant to Utah code."

Mr. Faulkner did not effectively renunciate his interest as the beneficiary of the trust. Rather, the renunciation stated in the body of the renunciation now, not the recitals but the actual renunciation, renunciation itself stated:

"Now, therefor, in consideration of the foregoing and pursuant to Utah Code Annotated 75-2-801, I, Lawrence C. Faulkner hereby renounce, relinquish and otherwise forfeit all my right, title and interest or claim as a beneficiary of the estate of Jenny A. Faulkner as though I had predeceased her."

The language of Mr. Faulkner's renunciation only disclaims his interest as a beneficiary of the estate, not as a beneficiary of the trust.

Now, Your Honor, I realize this is a very technical argument. But in order for a disclaimer to be valid it must comply strictly with the technical requirements of the statute. Let's turn this whole thing around. If Mr. Faulkner were standing before this Court seeking a

indicated, it seems to me there's no warrant in the law that says it has to be strict and hypertechnical. Now certainly there are things in the law that we have to do that with. This statute, however, says nothing about that.

It should be noted this statute is in derogation of the common law. At common law you had no right to disclaim your interest in a trust. The public policy of this state is that statutes in derogation of the common law are to be literally construed, not strictly and hypertechnically construed.

And so in this case I think if they want to now point out, and I have to emphasize this, this argument that while the language of the disclaimer itself... And admittedly this is cutting close to my particular bone because after all I wrote the dang thing. But if we're saying now that there's a problem with that language, it's interesting that that particular argument is not articulated, we have a five inch stack of pleadings, not articulated until the very last pleading that we don't get a chance to respond to. That's a significant fact.

But it seems to me it also would be incumbent if we're talking about a substantial compliance sort of analysis, somehow they have to show some prejudice that somehow somewhere somebody has been prejudiced as a result of our failure to strictly and hypertechnically comply with the

you know, completely clear. I think, I think this is makes the most sense, at least it does to me. Perhaps the Supreme Court or the Court of Appeals might very well disagree.

MS. SLAWSON: Thank you, Your Honor.

THE JUDGE: Thank you. And, and I, I would have to say, Counsel, that, that the written materials were most helpful (short inaudible, no mic).

I did, I did agree with Mr. Smith's analysis, Ms. Slawson, on the fact that you did cover something in your rebuttal that wasn't raised in, in the original and, and wasn't considered by him in his materials, and from a procedural point frankly I felt a little uncomfortable with that.

MS. SLAWSON: Yes, Your Honor.

THE JUDGE: Court is in recess.

MS. SLAWSON: Thank you, Judge.

WHEREUPON, the hearing was concluded.

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Exhibit B
Findings of Fact and Conclusions of Law

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IN THE SECOND JUDICIAL DISTRICT COURT

OF WEBER COUNTY, STATE OF UTAH

DAVID C. WHITNEY, an individual; WHITNEY ENTERPRISES, INC., a Minnesota corporation; and CON-BLAST, INC., a Minnesota corporation

Plaintiff,

vs.

LARRY FAULKNER, an individual and ROBERTA BEVERLY, an ndividual,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Civil No. 960900213 CV

Judge: Stanton M. Taylor

)AVID C. WHITNEY, an ıdividual; WHITNEY NTERPRISES, INC., a Minnesota ›rporation; and CON-BLAST, NC., a Minnesota corporation,

Plaintiff,

ENEE FAULKNER, an individual,
Garnishee,

Garnishee Defendant.

This matter came before the Court on the Garnishee Defendant, Renee Faulkner's Motion to Quash Garnishment, and the Traverse Complaint of Plaintiffs, David C. Whitney, Whitney Enterprises, Inc. and Con-Blast, Inc. (herein "Whitney") on March 14, 2002, at 1:30 p.m., the Honorable Stanton M. Taylor presiding. The parties briefed the issues in Defendant's Memorandum in Support of Motion to Quash, Plaintiffs' Memorandum in Opposition to Motion to Quash and in Support of Traverse, Defendant's Reply Memorandum in Support of Motion to Quash and in Opposition to Traverse, and Plaintiff's Reply Memorandum in Support of Traverse and in Opposition to Motion to Quash.

The Court having reviewed the parties' memoranda and citations to the record contained therein, having heard oral argument in this matter, and having considered the statements and admissions of the parties, and being fully advised in the premises, now makes the following:

FINDINGS OF FACT

1. Plaintiffs have an outstanding unsatisfied judgment against Larry Faulkner and Roberta Beverly.

2. Larry Faulkner has not been formally employed since 1993. Mr. Faulkner's mother, Jennie A. Faulkner, was his only source of income from 1993 until her death in 2000. Mr. Faulkner has not had a bank account in at least five years.

3. For the past 24 years, Larry Faulkner has lived at 3608 West 6000 South, Roy, Utah with his wife, Renee Faulkner. Mr. Whitney obtained a judgment lien on the home in approximately June 1988, which was released by Mr. Whitney in 1988 in consideration of the receipt of $10,000.00. The home has been in the name of Renee Faulkner since approximately 1991, when Larry Faulkner transferred his interest in the home to Renee Faulkner.

4. Larry Faulkner does not own a car, but drives a 1995 Toyota 4-Runner that belongs to Renee Faulkner. Larry Faulkner's gas money for the Toyota, at least in the year 2001, has come from Renee Faulkner. Larry Faulkner's spending money in the year 2001 also came from Renee Faulkner.

5. Renee Faulkner pays the credit card bills for the Visa credit card and the Chevron credit card that Larry Faulkner uses.

6. Presently, Renee Faulkner is Mr. Faulkner's only source of money.

7. On December 29, 1992, Jennie A. Faulkner, the mother of defendant Larry Faulkner, created a trust called the Jennie A. Faulkner Trust. She transferred her house at 1255 21st Street, Ogden, Utah (the "Home") into that trust by Warranty Deed on December 30, 1992. Jennie A. Faulkner amended and restated the trust on January 18, 1996 in a document entitled Amendment and Restatement of Trust (herein referred to as the "Trust"). Exhibit B to Faulkner's Memorandum in Support of Motion to Quash.

8. The Trust provided that upon Jennie's death, the Home in the name of the Trust was to be sold and the assets of the Trust were to be divided into three equal shares for the benefit of Jennie Faulkner's three children, Marilyn Clements, Glenda Burnside, and Larry Faulkner. Pursuant to the Trust, items of personal and household effects were to be distributed to individuals as set forth in "Exhibit B" to the Trust. In the event that not all of the personal and household items were disposed of by "Exhibit B," the personal and household items not listed on Exhibit B" were to go to Jennie A. Faulkner's children in approximate equal shares.

9. On January 18, 1997, Jennie Faulkner again amended her Trust. This was the last amendment to the Trust. The July 18, 1997 Amendment is referred to herein as "Amendment to Trust." See Exhibit C to Faulkner's Memorandum in Support of Motion to Quash.

10. Under the Amendment to Trust, Jennie Faulkner changed the distribution of her Trust. Instead of the Trust being divided equally among her three children, Jennie Faulkner left $30,000.00 or 30% (whichever was less) of the Trust estate to her two daughters and grandsons, and the remaining 70% to "Lawrence and Renee A. Faulkner." In the event that either Lawrence or Renee predeceased Jennie, the survivor was to succeed to the entire 70% interest in the Trust estate.

11. Jennie A. Faulkner died on November 9, 2000.

12. Renee Faulkner was appointed successor trustee under the terms of the Trust.

13. On November 18, 2000, Larry Faulkner, Glenda Burnside, Christie Zabriski, "Ray" Pete Clements, Ronnie Clements, and Frank Zabriski met at Jennie's home to distribute the personal property.

14. Some of the personal property of the Trust was located at Jennie's home, and the remainder of the personal property was located at the home of Renee and Larry Faulkner. The property located at Jennie's Home was distribute at the November 18th meeting to the three children, Glenda, Larry, and Marilyn or their representatives, and the children took possession of the property.

15. On November 19, 2000, there was a meeting at Renee and Larry Faulkner's house. The purpose of this meeting was to distribute the personal property which was referred to on "Exhibit B" to the Trust, which had not been distributed at the meeting the day before.

16. Present at the November 19, 2000 meeting were Renee Faulkner, Larry Faulkner, Christie Zabriski, and Glenda Burnside.

17. "Exhibit B" to the Trust provided that Glenda Burnside would receive the following property from the Trust:

a. Castle picture;
b. Hutch with China and table settings;
c. Wedding rings – original;
d. Diamond earrings; and
e. White rug.

18. "Exhibit B" to the Trust provided that Glenda Burnside's child, Mike, would receive the VCR from the Trust.

19. "Exhibit B" to the Trust provided that Larry and Renee Faulkner would receive the following personal property from the Trust:

a. Solitaire diamond;
b. Diamond necklace;
c. Bookcases;
d. Microwave;
e. Silverware;
f. Anniversary clock; and
g. Orange and green rug.

20. "Exhibit B" to the Trust provided that Renee Faulkner would receive a "ring" and any vehicle owned by Jennie Faulkner or the Trust at the time of Jennie's death, from the Trust.

21. "Exhibit B" to the Trust provided that Larry's child, Ben, would receive the stereo from the Trust.

22. "Exhibit B" to the Trust provided that Larry's child, Chris, would receive the VCR/Cassette holder from the Trust.

23. "Exhibit B" to the Trust provided that Marilyn Clements would receive the following personal property from the Trust:

a. Black onyx ring with diamond;
b. Smoke lamp;
c. Plaques on the wall (butterfly and flower); and
d. Saw clock.

24. "Exhibit B" to the Trust provided that Marilyn's child, Chris, would receive a "ring" from the Trust.

25. "Exhibit B" to the Trust provided that Marilyn's child, Robin, would also receive "ring" from the Trust.

26. On November 19, 2000, the items from "Exhibit B" to the Trust designated for Glenda Burnside, Marilyn Clements, Marilyn's daughter Chris, and Marilyn's daughter Robin were distributed to Glenda Burnside on behalf of Glenda, Marilyn, Chris, and Robin.

27. On approximately January 14, 2001, Trustee Renee Faulkner prepared an inventory of the Jennie Faulkner Estate and an accounting of the distributions made from the Trust (hereinafter referred to as "List of Distributions"). Exhibit 7 to Plaintiff's Memorandum in Support of Traverse and in Opposition to Motion to Quash.

28. The List of Distributions was prepared to demonstrate how the personal property of the Jennie A. Faulkner Trust had been distributed.

29. The List of Distributions indicates that specific items of personal property were distributed to Glenda Burnside, Marilyn Clements and Larry Faulkner.

30. As set forth in the List of Distributions, Larry Faulkner personally took possession of several items of personal property from the Trust, including the "Exhibit B" items, television and TV stand, mattress, towels, camera, binoculars, yard tools, clock, wood mirrors, various pictures, crystal nut dishes, tablecloths, kiln, various figurines and knickknacks, hide-a-bed, Christmas lights, vacuum cleaner, patio swing, bed, and mirror.

31. Larry Faulkner also received Jennie A. Faulkner's opal ring.

32. The home of Jennie A. Faulkner (owned by the Trust) was sold in April 2001, and the proceeds of sale were delivered to Renee Faulkner as Trustee on May 1, 2001. The net

proceeds of the sale of the home were $84,635.05, and there was an additional $1,820.58 cash from a Trust bank account which was held by the Trustee. The total cash in the Trust estate was $86,455.63 as of May 2, 2001.

33. On May 2, 2001, Orders in Supplemental Proceedings were issued against Roberta Beverly and Larry Faulkner.

34. On May 4, 2001, Roberta Beverly was served with an Order in Supplemental Proceedings in this case which ordered her to not dispose of any of her assets pending the hearing.

35. On May 4, 2001, Renee Faulkner as Trustee directed her attorney, Brad Smith, to distribute the cash assets from the Trust to the beneficiaries as follows:

a. Glenda Burnside: $10,000.00;
b. Marilyn Clements: $5,000.00;
c. Benjamin Faulkner: $8,645.56;
d. Christopher Faulkner: $4,322.78; and
e. Renee Faulkner: $58,487.29.

36. On May 10, 2001, an Order in Supplemental Proceedings was served on Larry Faulkner, and a Writ of Garnishment was served on Renee Faulkner in her individual capacity as Garnishee.

37. The Order in Supplemental Proceedings served on Larry Faulkner on May 10, 2001, restrained Mr. Faulkner from assigning or disposing of any of his assets prior to the Supplemental Proceedings Order hearing.

38. The Writ of Garnishment served on Renee Faulkner, as Garnishee, attached any monies in her possession which belonged to Larry Faulkner, and directed that she pay such funds to Plaintiff or the Court.

39. At the time Renee Faulkner was served with her Writ of Garnishment, she had received her alleged distribution of $58,487.29 from the Trust and had deposited it into her personal bank account.

40. On May 4, 2001, Larry Faulkner executed a document entitled "Renunciation of Interest." In the Renunciation of Interest executed by Larry Faulkner, the recitals of the Renunciation of Interest state that Mr. Faulkner "desires to renounce and relinquish all right, title, interest, or claim as a beneficiary of the Estate or Trust of Jennie A. Faulkner pursuant to Utah Code Ann. § 75-2-801."

41. The operative provisions of the Renunciation state, "Now, therefore, in consideration of the foregoing, and pursuant to Utah Code Ann. § 75-2-801, I, Larry C. Faulkner, hereby renounce, relinquish and otherwise forfeit all my right, title, interest, or claim as a beneficiary of the Estate of Jennie A. Faulkner as though I had predeceased her."

42. The Renunciation of Interest was filed in the Second District Court under Civil No. 013900149, on May 4, 2001.

43. Prior to May 4, 2001, the date that the Renunciation of Interest was executed and filed with the court, Larry Faulkner had taken possession of items of personal property from the Jennie A. Faulkner Trust, including the items listed on the List of Distributions, the "Exhibit B" items, and the opal ring.

44. Larry Faulkner did not disclaim, or attempt to disclaim, his interest in the Jennie A. Faulkner Estate or Trust prior to May 4, 2001.

45. Pursuant to stipulation by the parties and order of the Court dated, July 5, 2001, the $29,243.64 in question was deposited in Bank of Utah Account No. 1878442, to be held until further order of the Court or stipulation of all the parties (the "Escrowed Funds").

CONCLUSIONS OF LAW

1. Utah Code Ann. §75-2-801 provides:

(1) A person, or the representative of a person, to whom an interest in or with respect to property or an interest therein devolves by whatever means may disclaim it in whole or in part by delivering or filing a written disclaimer under this section

. . .

(5) The right to disclaim property or an interest therein is barred by:

(a) an assignment, conveyance, encumbrance, pledge, or transfer of the property or interest, or a contract therefor;

(b) a written waiver of the right to disclaim;

(c) an acceptance of the property or interest or a benefit under it; or

(d) a sale of the property or interest under judicial sale made before the disclaimer is made.

2. While U.C.A. §75-2-801(1) allows partial or fractional disclaimers, Mr. Faulkner's disclaimer is clearly not a disclaimer of a partial or fractional interest.

3. It is uncontroverted that in his disclaimer executed on May 4, 2001, Larry Faulkner purported to "renounce, relinquish, and otherwise forfeit all [his] right, title, interest, or claim as a beneficiary of the estate of Jennie A. Faulkner."

4. It is also uncontroverted that Mr. Faulkner took items of personal property belonging to the Trust prior to executing his disclaimer.

5. Pursuant to Utah Code Ann. §75-2-801(5)(c), Mr. Faulkner was barred from disclaiming his interest in the Trust because he had already taken and accepted property from the Trust as a beneficiary of the trust. The court finds that Mr. Faulkner's Renunciation of Interest was invalid and inoperative.

6. Pursuant to Utah Code Ann. §75-2-801(5)(c), a disclaimer is also barred if the intended disclaimant has taken a benefit from the property sought to be disclaimed.

7. The Court finds, alternatively, that Mr. Faulkner obtained a benefit from the Trust in that Mr. Faulkner receives all of his support and maintenance from his wife who is the other residuary beneficiary of the Trust. Mr. Faulkner's receipt of a benefit from the Trust bars and invalidates his disclaimer of the Trust property.

8. Since disclosures permitted under U.C.A. §75-2-801 are in derogation of the statutory and common law rights of creditors, disclaimers should be strictly construed. The language of Mr. Faulkner's disclaimer states that he his disclaiming "all [his] right, title, interest, or claim as a beneficiary of the estate of Jennie A. Faulkner." Mr. Faulkner's disclaimer does not disclaim a partial or fractional interest. The Court will not rewrite Mr. Faulkner's disclaimer to say something it does not say. The disclaimer, as executed by Mr. Faulkner, is barred and invalidated by Mr. Faulkner's prior acceptance of Trust personalty.

9. On May 10, 2001, at the time the Writ of Garnishment was served upon Renee Faulkner, she was in possession of $29,243.64, which rightfully belonged to Larry Faulkner as a beneficiary of the Trust of Jennie A. Faulkner.

10. For each of the foregoing reasons, the Court finds that Mr. Faulkner's Renunciation of Interest was invalid.

11. The Motion to Quash the Writ of Garnishment should be denied, and Plaintiffs should be granted judgment against Renee Faulkner on the Traverse Complaint, for the sum of $29,243.64, plus costs pursuant to Rules 64D(i) and 54(d), Utah Rules of Civil Procedure, with post-judgment interest thereon as provided by law.

12. Pursuant to the Writ of Garnishment, Renee Faulkner, as Garnishee Defendant should be hereby ordered to deliver to Plaintiffs' counsel the Escrowed Funds which shall be applied as a credit to the Garnishee Judgment.

DATED this 8 day of May, 2002.

BY THE COURT

Judge Stanton M. Taylor
District Court Judge

Approved as to form:

STEVENSON & SMITH, P.C.

Brad C. Smith
Attorney for Renee Faulkner and
Larry Faulkner

Exhibit C
Faulkner's Disclaimer

Renunciation of Interest

Whereas, Lawrence C. Faulkner is a beneficiary of the Trust of Jennie A Faulkner dated 29 December 1992, and amended on 18 July 1997; and

Whereas, Lawrence C. Faulkner's beneficial interest is a joint interest with his wife, Renee Faulkner; and

Whereas, Lawrence C. Faulkner desires to renounce and relinquish all right, title, interest or claim as a beneficiary of the estate or trust of Jennie A. Faulkner, pursuant to Utah Code Ann. § 75-2-801.

Now therefore, in consideration of the foregoing, and pursuant to Utah Code Ann. § 75-2-801, I, Lawrence C. Faulkner, hereby renounce, relinquish, and otherwise forfeit all my right, title, interest, or claim as a beneficiary of the estate of Jennie A. Faulkner as though I had predeased her.

DATED this 4 day of April, 2001.

Lawrence C. Faulkner

County of Weber)
:s s
State of Utah)

On this 4 day of April 2001, personally appeared before me, Lawrence C. Faulkner, being personally known to me or having identified himself by photographic identification, and said and deposed that he has read the foregoing document, that he understands the terms of the foregoing document, and that he has executed it as his free and voluntary act.

BRAD C. SMITH
NOTARY PUBLIC • STATE of UTAH
2905 WASHINGTON BLVD
OGDEN, UT 84401
COMM. EXP. 11-06-2001

Notary Public